

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SUSAN COHEN	:	DETERMINATION
	:	DTA NO. 818806
for Redetermination of Deficiencies or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Personal Income Tax pursuant to the Administrative Code of the City of New York for the Periods Ending March 31, 1998; June 30, 1998 and December 31, 1998.	:	

Petitioner, Susan Cohen, 42 Huron Road, Yonkers, New York 10710-5034, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax pursuant to the Administrative Code of the City of New York for the periods ending March 31, 1998; June 30, 1998 and December 31, 1998.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 90 South Ridge Street, Rye Brook, New York on December 13, 2002 at 10:30 A.M. Petitioner appeared by Stanley A. Ross, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Gregory Guida).

Since neither party elected to reserve time for the submission of post hearing briefs, the three-month period for the issuance of this determination began as of the date the hearing was held.

ISSUE

Whether petitioner was a person required to collect, truthfully account for and pay over the New York State and City income taxes withheld by The Hands of Healing, Inc. from the wages paid to its employees and, if so, whether she willfully failed to perform such duties and is thus liable for a penalty equal in amount to the taxes not collected, truthfully accounted for and paid over.

FINDINGS OF FACT

1. The Hands of Healing, Inc. (“the corporation”) was incorporated in the State of New York on May 13, 1993 and its primary business activity involved home health care. Petitioner, Susan Cohen, is a registered nurse and is president and sole shareholder of the corporation.

2. For the quarterly periods ending March 31, 1998; June 30, 1998 and December 31, 1998, the corporation withheld New York State and City income taxes of \$7,056.34, \$7,515.64 and \$1,659.77, respectively, from the wages paid to its employees. The corporation, however, failed to pay over these funds to the Division of Taxation (“Division”) as required by law.

3. On February 5, 2001, the Division issued three notices of deficiency to petitioner asserting that she was “an Officer/Responsible person of The Hands of Healing, Inc.” and, as such, was liable, pursuant to Tax Law § 685(g), “for a penalty in an amount equal to the tax not paid by the business. . . .” Petitioner contested all three notices by filing a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”). On August 10, 2001, BCMS issued a Conciliation Order to petitioner which sustained in full all three notices of deficiency at issue herein. Petitioner thereafter filed a petition with the Division of Tax Appeals and this proceeding subsequently ensued.

4. As noted earlier, petitioner is a registered nurse who, prior to the formation of Hands of Healing, Inc., had no experience owning or operating a business. When the corporation was first formed in 1993 petitioner did not devote her full time and energies to the business; however, this changed in 1996 when she concentrated all of her efforts on increasing revenues. Petitioner was successful in increasing sales; however, a series of events occurred which ultimately led to the corporation's ceasing all business activities on February 28, 1999 and subsequently filing for bankruptcy.

5. Petitioner's husband died on November 11, 1995, and for the first time, she was left to run the business on her own. Initially, petitioner was able to stay current with all expenses, including taxes, but as the business grew she found it difficult to handle everything by herself. Further complicating matters was the fact that the majority of the revenue generated by the corporation came from Medicaid and in petitioner's words "Medicaid was slow in making payments."

6. After her husband's death it became apparent to petitioner that she could not remain current with the corporation's liabilities. Accordingly, petitioner refinanced the mortgage on her house, taking what equity she had in the residence and funneling the funds back into the corporation. This, however, proved to be a temporary fix, and in February 1997 she established a relationship with Tri State Factoring ("Tri State"), a company that would underwrite the corporation's payroll as a loan at an interest rate of 20%.

7. As the corporation's debt to Tri State grew, the principals of Tri State became more active in its day-to-day operations. Eventually, Tri State took over the corporation's payroll and the filing of payroll tax returns. As the corporation received income, petitioner would send the

majority of the receipts to Tri State for payment of the weekly wages and payroll taxes and she would retain the balance of the funds for the payment of other expenses.

8. Petitioner, on occasion, would sign blank withholding tax returns as president of the corporation and leave them with Tri State for its use in filing the returns. The record herein does not disclose whether any of the withholding tax returns filed for the periods at issue were blank returns which petitioner had signed and left in the custody of Tri State.

9. In October 1998 it became known to petitioner that not all of the New York State and City withholding taxes deducted from employee wages had been remitted to the Division as required by law. Petitioner immediately thereafter utilized the services of a payroll company to prepare both the weekly payroll and all withholding tax returns.

10. Although petitioner was held personally liable for Federal withholding and social security taxes owed by the corporation, the issue concerning whether she was properly considered a responsible officer of the corporation was never litigated at the Federal level. Instead, petitioner submitted an offer in compromise, based on inability to pay, to the Internal Revenue Service ("IRS"). The IRS concluded that petitioner had no ability to pay and therefore she has not been pursued by the IRS for collection of past due Federal taxes.

CONCLUSIONS OF LAW

A. Tax Law § 685(g) provides as follows:

Willful failure to collect or pay over tax.--Any person required to collect, truthfully account for, and pay over the tax imposed by this article who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

Tax Law § 685(n), in turn, furnishes the following definition of a “person” subject to the section 685(g) penalty:

[t]he term person includes an individual, corporation, partnership or limited liability company or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, or a member, manager or employee of a limited liability company, who as such officer, employee, manager or member is under a duty to perform the act in respect of which the violation occurs.

B. The question of whether someone is a “person” under a duty to collect and pay over withholding taxes is a factual one. Factors which should be considered are, *inter alia*, whether the particular individual signed tax returns, derived a substantial part of his or her income from the corporation, or had the right to hire and fire employees (*Matter of Malkin v. Tully*, 65 AD2d 228, 412 NYS2d 492, 494, *affd* 49 NY2d 920, 428 NYS2d 675). Other pertinent areas of inquiry include the person’s official duties, the amount of corporation stock he or she owned, and their authority to pay corporate obligations (*Matter of Amengual v. State Tax Commn.*, 95 AD2d 949, 464 NYS2d 272,273; *see, Matter of McHugh v. State Tax Commn.*, 70 AD2d 987, 417 NYS2d 799, 801).

C. Summarized in terms of a general proposition, the issue to be resolved is whether petitioner had, or could have had, sufficient authority and control over the affairs of the corporation to be considered a person under a duty to collect and remit the unpaid taxes in question (*Matter of Constantino*, Tax Appeals Tribunal, October 22, 1990; *Matter of Chin*, Tax Appeals Tribunal, December 20, 1990). Furthermore, if petitioner is found to be a person under a duty as described, it must then be decided whether her failure to withhold and pay over such taxes was willful. The question of willfulness is related directly to the question of whether petitioner was a person under a duty, since clearly a person under a duty to collect and pay over

the taxes is the one who can consciously and voluntarily decide not to do so. However, merely because one is determined to be a person under a duty, it does not automatically follow that a failure to withhold and pay over income taxes is “willful” within the meaning of that term as used in Tax Law § 685(g). As the Court of Appeals indicated in *Matter of Levin v. Gallman* (42 NY2d 32, 396 NYS2d 623), the test is:

[w]hether the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes. . . . No showing of intent to deprive the Government of its money is necessary but only something more than accidental non-payment is required (*id.*, 396 NYS2d at 624-625; *see, Matter of Lyon*, Tax Appeals Tribunal, June 3, 1988).

D. Upon review of the entire record, it must be concluded that petitioner was properly held responsible for the withholding tax obligations of the corporation. The record herein establishes that for the period in dispute petitioner was the president and sole shareholder of the corporation; devoted 100% of her time to its affairs; signed tax returns, including the withholding tax returns at issue in this proceeding; controlled the corporation’s receipts; was involved in the payment of some creditors and was an authorized signatory on the corporate checking account.

While it is unfortunate that petitioner apparently relied on Tri State to handle the corporation’s withholding tax matters, it must be noted that corporate officials, such as petitioner, cannot be absolved of their responsibility by disregarding their duty and relying on others to fulfill their obligations (*Matter of Baumvoll*, Tax Appeals Tribunal, November 22, 1989). As president and sole shareholder of the corporation, petitioner had a fiduciary duty to the corporation (and legal authority to act for it) and, consequently, a responsibility to act for the corporation in complying with its withholding tax obligations (*see, Matter of Martin v. Commr.*

of Taxation & Fin., 162 AD2d 890, 558 NYS2d 239; *Matter of LaPenna*, Tax Appeals Tribunal, March 14, 1991). Exceptions have been found only where the corporate officers proved that they were *precluded* from acting on behalf of the corporation by the acts of another (see, e.g., *Matter of Turiansky*, Tax Appeals Tribunal, April 29, 1993; *Matter of Moschetto*, Tax Appeals Tribunal, March 17, 1994; *Matter of Constantino*, *supra*). Petitioner has failed to prove such preclusion. In fact, her status as sole shareholder makes such burden of proof a nearly impossible task. In such circumstances, the sole shareholder and officer is viewed as having the legal authority and duty to act on behalf of the corporation and, therefore, should be held liable for taxes due notwithstanding the fact that the taxpayer may not have exercised actual control over the corporation (*Matter of Martin v. Commr. of Taxation & Fin.*, *supra*; *Matter of Blodnick v. New York State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027; *Matter of Marvin H. Mason, Inc.*, Tax Appeals Tribunal, July 29, 1993; *Matter of LaPenna*, *supra*; *Matter of American Futures Group, Inc.*, Tax Appeals Tribunal, February 6, 2003).

E. The petition of Susan Cohen is denied and the three notices of deficiency dated February 5, 2001 are hereby sustained.

DATED: Troy, New York
March 6, 2003

/s/ James Hoefer
PRESIDING OFFICER